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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER SOTO, Defendant and Appellant.	H029306 (Monterey County Super. Ct. No. 002410)

Defendant Francisco Javier Soto appeals from an order of the trial court denying his motion to vacate judgment pursuant to Penal Code section 1016.5.[1] Defendant had moved to vacate his 1980 misdemeanor conviction for receiving stolen property due to the presumed failure to advise him of the possible immigration consequences of his plea agreement. He contends that the court abused its discretion in finding that an advisement of the immigration consequences of his plea in 1993 to a different misdemeanor put him on notice that he faced possible immigration consequences for his plea in 1980, and therefore that he failed to show due diligence because he did not seek relief until 2005. We conclude that the record does not support a finding that defendant carried his burden of showing that he was prejudiced by the presumed nonadvisements of possible immigration consequences in 1980. Accordingly, we will affirm the trial court's order.

[1] All further statutory references are to the Penal Code.

BACKGROUND

In 1980, the District Attorney of Monterey County charged defendant with burglary and possession of stolen property. Defendant entered a negotiated no contest plea to misdemeanor receiving stolen property, a stereo and cassettes (§ 496), and was granted probation for 24 months on August 1, 1980, on condition that he serve 180 days in jail with 150 days suspended. In 1981, defendant admitted violating probation and was ordered to serve 30 days in custody. On June 4, 1996, at the request of defendant pursuant to section 1203.4, the trial court vacated the 1980 plea, entered a plea of not guilty, and dismissed the complaint. On March 25, 2005, defendant filed a motion to vacate the 1980 judgment pursuant to section 1016.5, contending that his request for permanent resident status had been denied by the United States Department of Homeland Security (DHS) in 2004 as a result of his guilty plea, that prior to entry of his plea he had not been advised of the possible immigration consequences of his plea,[2] and that, had he been so advised, he would not have entered his plea.

The district attorney filed opposition to the motion on April 8, 2005, contending that defendant had not filed the motion with due diligence because he became aware of potential consequences of his 1980 conviction when he sustained three separate driving under the influence (DUI) convictions in 1984, 1986, and 1993.

At a hearing on June 8, 2005, defendant testified that he and his counsel in 1980 spoke with each other in Spanish, but counsel never asked him about his citizenship status. He did not have an interpreter when he appeared in court, and spoke to the court in Spanish through his counsel. The court advised him of the rights that he would be giving up if he pleaded guilty, but the court did not advise him that by entering his plea

[2] "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." (§ 1016.5, subd. (b)). All court records of defendant's 1980 conviction have been destroyed in accordance with California law.

he could be deported or denied admission or naturalization. He did not want to plead guilty; he was advised to do so in order to get lesser charges, so he did. He was convicted of a misdemeanor and was given a jail sentence, which he completed after going to Fresno and returning a year later. He was later convicted three different times of DUI charges in Kings County, the latest in 1993. At no time during those cases was he ever informed that there might be immigration consequences of his convictions. When he applied to expunge his Monterey County conviction pursuant to section 1203.4, he also applied to expunge his Kings County convictions. He applied to become a permanent resident in 2001, but did not receive a response from DHS until August 2004. That was when he learned for the first time that his 1980 conviction had immigration consequences.

Following defendant's testimony, the matter was continued to July 20, 2005. On July 12, 2005, the district attorney filed a supplemental response to defendant's motion to vacate. Attached to the response were documents from defendant's 1993 misdemeanor DUI conviction, including an advisement of rights, waiver and plea form that defendant initialed and signed. On page 2 of 5 of that form, defendant had initialed the box next to the following advisement: "I understand that if I am **not a citizen**, a plea of guilty or no contest could result in deportation or exclusion from admission to this country, or denial of naturalization or amnesty." (Emphasis in original.) Defendant filed a reply to the supplemental response on July 19, 2005, arguing that the 1993 DUI conviction did not give rise to notice of, or a duty to investigate, the immigration consequences of the 1980 conviction, because the DUI conviction was not a crime of moral turpitude.

At the continued hearing on July 20, 2005, after argument from the parties the court ruled as follows: "This is defendant's motion to vacate pursuant to Penal Code section 1016.[5]. . . . [¶] . . . [¶] . . . [I]n considering a motion such as that, in this case, the defendant must show, number one, a failure to advise. [¶] And I think, based on the record before us, this court must assume that he was not advised at the time he pled in

this case in 1980 that there were immigration consequences. [¶] Number two, the defendant must show immigration consequences resulting from the failure. And you have made it clear, [counsel], and the defendant has, that there are and would be immigration consequences. [¶] Number three, legal prejudice resulting from the failure. And it appears that there would be legal prejudice. [¶] And number four, due diligence by the party seeking relief.

"In this case the record before the court does support the fact that in 1993 the defendant did sign a waiver of rights form containing the following language: [¶] Quote, 'I understand that if I am not a citizen, a plea of guilty or no contest could result in deportation or exclusion from admission to this country or denial of naturalization or amnesty.' Close quote. [¶] We've also discussed the evidence in the record in this case that the judge made a finding that the defendant knowingly, expressly, understandingly and intelligently waived his or her Constitutional rights. [¶] And that the defendant did have an attorney who noted that he discussed the facts of the defendant's case with the defendant and explained the consequences of the plea, the elements of the offense and the possible defenses with him. [¶] While I believe that the defendant has made a fascinating and interesting argument on the legal issues, to follow those arguments through to their logical conclusion would require me to find that the judge in this case either was not acting appropriately when he made the finding that the defendant had knowingly, expressly, understandingly and intelligently waived his or her Constitutional rights, committed some malfeasance, was asleep and signed it anyway. And this court cannot reach that conclusion.

"In addition, an issue as to the credibility of the defendant is raised, given that he was on the stand, testified in this case, that in the . . . subsequent criminal cases that he was involved in, he was not advised of any immigration consequences, and in fact, the record shows to the contrary. [¶] In addition, looking at the 1993 record, it was a misdemeanor offense. And certainly even though that was a different offense, if it could

have had adverse immigration consequences, his conviction could have had adverse immigration consequences, his conviction in this case would clearly pose to a reasonable person the same risk.

"The defendant has not testified as to any explanation for the 11-year delay between the 1993 case on which he received the admonition with respect to immigration consequences and the date on which this motion was filed. [¶] The only explanation given is that sometime in 2004 he was notified by the Immigration and Naturalization Services that there would, in fact, be consequences.

"For all of the reasons that have been articulated by the District Attorney in this case, the court does at this time deny the motion to vacate."

DISCUSSION

Section 1016.5, subdivision (b) requires the trial court to vacate a judgment and permits the defendant to withdraw a plea of guilty or no contest and to enter a not guilty plea if, after January 1, 1978, the trial court failed to advise the defendant of the possible immigration consequences of the plea and the defendant shows that the conviction may have immigration consequences. The section further provides that, absent a record that the advisements were provided, it is presumed that a defendant did not receive them. However, the statute "contains no provision indicating when a defendant must make a motion to vacate." (*People v. Totari* (2002) 28 Cal.4th 876, 881 (*Totari 1*); *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 204.)

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citation.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised. [Citation.]" (*Totari 1*,

supra, 28 Cal.4th at p. 884.) The trial court's ruling on the motion is reviewed for abuse of discretion. (*Zamudio*, *supra*, 23 Cal.4th at p. 192.)

"[T]he trial court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay. [Citation.] The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1207 (*Totari 2*).) "[D]efendant bore the burden of proving his reasonable diligence, and we review the superior court's finding for abuse of discretion." (*Totari 2*, *supra*, 111 Cal.App.4th at p. 1208.)

Defendant contends that the court abused its discretion in finding that he did not file the motion to vacate his 1980 conviction with due diligence. He argues that a motion to vacate under section 1016.5 is timely unless a defendant delays without excuse after a defendant is put on notice that immigration consequences actually may occur and that the risk is more than a remote possibility. "Put another way, that relief under section 1016.5 is predicated upon a defendant's demonstrating his conviction 'may have' one or more of the specified consequences implies that such a motion is timely if brought within a reasonable time after the conviction actually 'may have' such consequences." (*Zamudio*, *supra*, 23 Cal.4th at p. 204.)

The trial court found that defendant's motion to vacate his 1980 receiving stolen property conviction was not filed with due diligence because defendant's 1993 DUI conviction, where he was informed of the possible immigration consequences of his plea, put him on notice that he faced an actual risk of adverse immigration consequences for his 1980 conviction. Defendant contends that the court erred in making this finding because "there was no substantial evidence that defendant faced an actual risk of adverse

immigration consequences for his 1980 conviction in 1993. In fact, in 1993 [defendant] did not face an actual risk of exclusion for his 1980 conviction."

The People contend that "[t]he prosecutor correctly argued that the 1993 conviction put [defendant] on notice that his mounting convictions threatened immigration consequences and disproved his diligence." The People further contend that defendant has not established prejudice as the record "contains no evidence suggesting that [defendant] would not have entered his 1980 guilty plea had he been told about the immigration consequences mentioned" in section 1016.5.

It was defendant's burden to present evidence to the trial court that his 2005 motion to vacate was filed with due diligence. (*Totari 2*, *supra*, 111 Cal.App.4th at p. 1208.) The trial court found that "the record before the court does support the fact that in 1993 the defendant did sign a waiver of rights form containing the following language: [¶] Quote, 'I understand that if I am not a citizen, a plea of guilty or no contest could result in deportation or exclusion from admission to this country or denial of naturalization or amnesty.' Close quote. [¶] We've also discussed the evidence in the record in this case that the judge made a finding that the defendant knowingly, expressly, understandingly and intelligently waived his or her Constitutional rights. [¶] And that the defendant did have an attorney who noted that he discussed the facts of the defendant's case with the defendant and explained the consequences of the plea, the elements of the offense and the possible defenses with him. [¶] While I believe that the defendant has made a fascinating and interesting argument on the legal issues, to follow those arguments through to their logical conclusion would require me to find that the judge in this case either was not acting appropriately when he made the finding that the defendant had knowingly, expressly, understandingly and intelligently waived his or her Constitutional rights, committed some malfeasance, was asleep and signed it anyway. And this court cannot reach that conclusion."

Defendant contends that there was no substantial evidence that he faced an actual risk of adverse consequences for his 1980 conviction in 1993. And, defendant presented evidence that he did not learn of the actual immigration consequences of his 1980 conviction until 2004. However, even if we were to find that defendant's 2005 motion to vacate his plea was filed with due diligence, our analysis would not end there. Defendant would be entitled to reversal of the trial court's order denying the motion to vacate only if the record supports a finding that, had defendant filed his motion to vacate with due diligence, defendant was otherwise entitled to relief.

As stated above, in order to be entitled to relief, in addition to showing that there was more than a remote possibility that he faced an adverse immigration consequence due to the 1980 conviction at the time he filed his motion, defendant also had to show that he was prejudiced by the presumed nonadvisements in 1980. That is, defendant had to show that it was reasonably probable that he would not have pleaded no contest in 1980 had he been properly advised. (*Totari 1*, *supra*, 28 Cal.4th at 884.)

The trial court found "legal prejudice resulting from the failure" to advise. This finding appears to be based on the trial court's prior finding that "the defendant must show immigration consequences resulting from the failure. And you have made it clear, [counsel], and the defendant has, that there are and would be immigration consequences." However, while the record indicates that there might presently be immigration consequences, the record does not support the finding that defendant carried his burden of showing that he was actually prejudiced by the presumed failure of the 1980 trial court to give the section 1016.5 advisements, in that he would not have pleaded no contest in 1980 had he been properly advised.

The record indicates that defendant was charged with burglary as well as receiving stolen property in 1980, thus he faced a possible prison sentence. Defendant declared that he was with a juvenile friend when officers found a recently stolen stereo and cassettes in the pocket of the jacket the juvenile was wearing. Defendant also declared

that he remained in custody following his arrest until he entered into the negotiated disposition, and was only required to serve a 30-day jail term as a result of his plea and later admission of a probation violation. Moreover, defendant declared that his motivation for accepting the plea agreement was so that he could be immediately released from custody in order to travel to Fresno to be present for the birth of his first child.

Defendant submitted a declaration stating that, if he had known that there were immigration consequences as a result of his 1980 conviction, he would not have entered his plea. However, as a general rule, such self-serving declarations lack trustworthiness. (See *People v. Duarte* (2000) 24 Cal.4th 603, 613.) Further, the trial court specifically found that "an issue as to the credibility of the defendant is raised, given that he was on the stand, testified in this case, that in . . . the subsequent criminal cases that he was involved in, he was not advised of any immigration consequences, and in fact, the record shows to the contrary."

Defendant did not present any evidence that his 1980 conviction actually had adverse immigration consequences at the time he entered his plea. In fact, in 1980, defendant's conviction was neither a deportable offense nor an excludable offense. In 1980, a noncitizen was deportable if he was convicted of a crime involving moral turpitude[3] committed within five years after entry and either sentenced to confinement or confined therefore in a prison or corrective institution for a year or more. (Former 8 U.S.C. § 1251(a)(4); see Harper, Immigration Laws of the United States (3d ed. 1975) Deportation and Deportable Aliens, § 7, pp. 582-585; Gordon & Gordon, Immigration and Nationality Law (Student ed. 1982) § 4.12, pp. 4-30—4.35.) Defendant declared that he was placed on probation and was ordered to serve 30 days in jail, thus he was neither sentenced to, nor incarcerated for, a year or more as a result of his 1980 conviction. And,

[3] It is undisputed that defendant's 1980 conviction for receiving stolen property is a crime of moral turpitude for immigration purposes.

there is nothing in the record indicating that defendant's 1980 conviction was committed within five years after his entry. In 1980, a noncitizen was excludable if he was convicted of a crime involving moral turpitude, unless he came within the youthful offender or petty offense exception. The petty offense exception applied when the noncitizen was convicted of only one misdemeanor involving moral turpitude and was sentenced to not more than six months. (Former 8 U.S.C. § 1182(a)(9); see Harper, Immigration Laws of the United States, *supra*, Inadmissible Aliens, § 5, pp. 380, 389-391; Gordon & Gordon, Immigration and Nationality Law, *supra*, § 2.39, pp. 2-69—2-72.) Again, defendant's 1980 offense was a misdemeanor and he declared that he was sentenced to only 30 days in county jail.

The record does not support a finding that, had defendant been properly advised as to immigration consequences at the time of his 1980 negotiated plea, it is reasonably probable that he would not have pleaded no contest. Rather, the record supports the finding that, had he been properly advised, defendant would still have entered his plea because, among other things, based on the immigration law of the United States, he was not subject to deportation or exclusion at the time of the plea. Because the record does not support a finding that defendant carried his burden of showing that he was prejudiced by the presumed nonadvisement of possible immigration consequences in 1980 when he entered his plea, even if we were to find that defendant's motion to vacate had been filed with due diligence, defendant was not entitled to relief. Accordingly, on the record before us, we cannot find that the trial court abused its discretion in denying defendant's motion to vacate.

DISPOSITION

The order denying defendant's motion to vacate judgment pursuant to section 1016.5 is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.